No. ~~9945~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

VIRGINIA DAVIS HARTMAN and MARGARET DAVIS RICHARDSON,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

An examination of the points and authorities submitted by the able counsel for the appellee Bank in Brief for Appellee discloses that there are but two points upon which the appellee Bank (hereinafter called defendant Bank) relies.

The first point is that the second amended complaint does not state facts sufficient to show *extrinsic* fraud. The second point raised is that the Statute of Limitations is a bar, because the pleading is not sufficient to show that the fraud was discovered within three years next preceding the commencement of the action.

The motion to dismiss, which is the equivalent of a demurrer, admits all of the facts set up in the second amended complaint to be true.

The able counsel, in their Brief for Appellee, present plausible arguments in their usual masterly way and make a frantic effort to save the defendant Bank from being put on its defense for the fraud committed by it and the other defendants, in victimizing the appellants, plaintiffs in the Court below. They tacitly admit that the Bank committed the frauds charged against it and the other defendants, as set out in the second amended complaint, but they seek refuge behind the weak and tenuous defense that the fraud was *intrinsic* and therefore cannot be reached or corrected in a Court of justice.

The appellants stoutly maintain that the affirmative allegations of the second amended complaint, admitted to be true for the purposes of the motion to dismiss, present a clear case of *extrinsic* fraud which is actionable in a Court of equity.

Many of the points endeavored to be made by counsel for defendant Bank would have us plead evidence which is not the purpose of, nor is it correct, pleading. We endeavor, in the second amended complaint, to allege only the ultimate facts.

Extrinsic Fraud.

We allege that the defendant Dole was advised by the defendants Humphrey and Elkins, who acted not only as the attorneys for appellants and Dole, but also for defendant Bank as the special administrator of the estate of Martina Maxine Dole, deceased, and her heirs (including appellants), not to appear before the Probate Court at the hearing of said petition to compromise the fraudulent indebtedness of defendant

Sinai, so that he (Dole) could not voice his protest or testify in open Court his objections to the totally inadequate and unconscionable compromise, which was being forced upon the Probate Court by the defendant Bank, as special administrator, even over the protest of the Bank's own attorneys, defendants Humphrey and Elkins, and by suppressing from the Probate Court the true facts of the compromise. If this does not constitute a bare-faced fraud of an *extrinsic* character, then we find it difficult to imagine one that does.

Such acts of fraud and similar ones come squarely within the salutary doctrine of *extrinsic* fraud, as is well stated by the Supreme Court of California in *Bergin v. Haight,* 99 Cal. 52, *55,* as follows:

> *"To be actionable, as stated by our chief justice in Pico v. Cohn,* 91 Cal. 129, 25 Am. St. Rep. 159, *it must be 'a fraud extrinsic or collateral to the questions examined, and determined in the action * * * Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat, or being regularly employed, corruptly sells out his client.' The fraud herein cited relied upon falls within the principle illustrated by the example stated above, and certainly within the principle underlying many other cases."* (Citing many cases.)

In the early and leading case of *U. S. v. Throckmorton,* 98 U. S. 61, 25 L. Ed. 93, the Supreme Court

points out clearly that where a fiduciary relationship is relied upon *the facts constituting the fraud are extrinsic in their character,* using the following language:

> "But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, *as by keeping him away from court,* a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and *connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side*—these and similar cases which show that there never has been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and upon the case for a new and fair hearing." (Italics ours.)

See, also, language of the Supreme Court of California in the leading case, on *extrinsic fraud,* of *Campbell v. Campbell,* 152 Cal. 201. See, also, the many cases on *extrinsic fraud* cited by us in Appellants' Opening Brief. (Pages 28, 32-33, 38-48.)

We further allege, as *extrinsic fraud,* that defendant Bank's own attorneys, defendants Humphrey and Elkins, advised defendant Bank that said compromise

was illegal and a fraud on the heirs, including appellants (plaintiffs), of said Martina Maxine Dole, deceased, and so advised the Bank as such special administrator but that said defendant Bank, its officials and agents, informed said defendants Humphrey and Elkins that said Humphrey and Elkins were acting as the attorneys of said defendant Bank, as special administrator, and that said Bank was not asking the opinion of its said attorneys, Humphrey and Elkins, as to matters of policy, and if they were unwilling to present to the Probate Court a petition for compromise in the sum of $5000 (whereas the second amended complaint alleges that the property involved was worth the sum of some $3,000,000), said defendant Bank would procure the services of other attorneys to represent it as special administrator; in other words, that the Bank committed a fraud, *extrinsic fraud,* in forcing through a grossly inequitable compromise, of all of which facts the appellants (plaintiffs), living in New York, were kept in complete ignorance by their own lawyers, Humphrey and Elkins, who also acted as attorneys for defendant Bank as special administrator.

If such fraudulent conduct on the part of the defendant Bank and of its attorneys, who were also the attorneys for the appellants (plaintiffs), does not constitute *extrinsic fraud,* then it is difficult to imagine a case that does.

In fact, under the allegations of the second amended complaint, the defendant Bank was the principal bad actor and played a most vital part in the fraudulent

scheme by the Bank and the other defendants including its attorneys, who also represented the Estate of Martina Maxine Dole and her heirs, to force through the inequitable and fraudulent compromise by purposely suppressing the true facts of the compromise from the Probate Court resulting in that Court approving the compromise, which the defendant Bank, taking advantage of its own unconscionable wrong, now claims is *res adjudicata* and the gross fraud motivating such compromise *intrinsic.*

The second amended complaint affirmatively sets up many other facts which were fraudulently suppressed from the Probate Court of San Mateo County, California, when the compromise in the meagre and totally inadequate sum of $5000 was forced through by the defendant Bank and its attorneys, which, had the same been honestly and fairly presented to the Probate Court, it is inconceivable the Court ever would have approved the compromise.

But all of these matters of the fraudulent conduct of the defendant Bank and of the other defendants and their intimate fiduciary relations are fully alleged in the second amended complaint and were exhaustively discussed and pointed out by us in Appellants' Opening Brief and, to do so again, would only involve repetition.

One point should, however, be stressed. That is, that there is nothing in the second amended complaint or in any of the previous complaints to indicate that appellants (plaintiffs) gave to defendant Dole any authority save and except as stated in paragraph XXIII which, so far as is applicable, is as follows:

"That the said defendant, Arthur A. Dole, further advised the said plaintiffs that there were certain matters involving the property of the said Martina Maxine Dole, deceased, that would require attention and likewise services of an attorney or attorneys at law to represent said heirs of the said Martina Maxine Dole, deceased, as aforesaid, and that he, the said defendant, Arthur A. Dole, had or was about to procure the services of the said defendant, C. F. Humphrey and Luther Elkins to represent him as an heir at law of the said Martina Maxine Dole, deceased, and *suggested* that he, the defendant Arthur A. Dole, would be very glad to protect the interests of the said plaintiffs and to have said defendants, C. F. Humphrey and Luther Elkins, act as attorneys for all of the heirs at law, including said plaintiffs, of the said Martina Maxine Dole, deceased; that said *suggestion* met with the approval of said plaintiffs and said approval was communicated by them to the said defendant, Arthur A. Dole; *that the said defendant Arthur A. Dole did not at said time or at any time subsequent thereto advise the said plaintiffs specifically as to any of the property or other rights belonging to the said deceased, Martina Maxine Dole, and more particularly any or all of the facts or circumstances involved and existing between said Martina Maxine Dole, deceased, during her lifetime and the said defendants Samuel Platt and John S. Sinai concerning the purchase of the said mining property, all of which has been heretofore more specifically alleged and set forth.*" (See Par. XXIII, Tr. 21-22.)

Clearly, defendant Dole was not, by these words, made an *attorney in fact of the appellants (plaintiffs)*

with the right to compromise claims. The language is clear that to protect the interest of appellants (plaintiffs) and himself, he was authorized to employ attorneys at law. Once he did that, his agency, if such it can be termed, was ended. Any knowledge he had then or acquired subsequent to that time, was not transferred or imputed to the appellants (plaintiffs). Therefore, before discussing any of the points raised by defendant Bank, let us consider some general rules as to agency.

Section 2321 of the Civil Code of the State of California reads as follows:

> "When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned."

See, also:

Billings v. Morrow, 7 Cal. 172, *174.*

The special authority given by appellants (plaintiffs) to defendant Dole was to engage counsel for them as heirs. From the moment Dole did that, and the second amended complaint alleges in paragraph XXIV that he did hire Elkins and Humphrey, a confidential relationship existed between appellants (plaintiffs) and Elkins and Humphrey. This one act of Dole was the sum total of the agency relationship between Dole and the appellants (plaintiffs). We stress this point particularly because counsel for defendant Bank tries to imply at various opportunities that we are bound by Dole's knowledge of the compromise, by statements made to Dole by Humphrey and Elkins, by the legal opinion rendered to Dole and

similar incidents. Dole, being the agent for a limited purpose only, any knowledge of Dole, not acquired within the scope of his agency is not binding on appellants (plaintiffs).

Now we come to the crux of the second amended complaint. Appellants (plaintiffs), through Dole, engaged Humphrey and Elkins as their attorneys to represent them in the probate proceedings. Humphrey and Elkins accept that employment and in addition to that, accept employment as counsel for the special administrator, the defendant Bank. Usually, in probate proceedings, no conflict exists between the heirs and the administrator, and clearly, at the outset of the probate proceedings, no conflict existed. The allegations of paragraph XXV (Tr. 25-26) allege that Humphrey and Elkins strenuously objected to the contemplated compromise. From that moment on, a conflict existed between the heirs and the administrator and from that moment on Humphrey and Elkins represented conflicting interests. From that moment on Humphrey and Elkins did not give to the appellants (plaintiffs) the representation they were entitled to; from that moment on Humphrey and Elkins became the servile and supine tools and employees of the defendant Bank, and did its bidding instead of being loyal and faithful to the appellants (plaintiffs); from that moment on appellants (plaintiffs) *unknowingly* lost their legal representation in Court.

All of these *extrinsic* facts were purposely suppressed from the Probate Court, as alleged in the second amended complaint, when the unfair and un-

just compromise came up before the Probate Court for approval.

Of all of which facts, the appellants (plaintiffs) were kept in complete ignorance as is alleged in paragraph XXIV (Tr. 42-43.)

Again we quote to this Court *U. S. v. Throckmorton,* 98 U. S. 61, previously cited by us, and *Bergin v. Haight,* 99 Cal. 52; *Caldwell v. Taylor,* 218 Cal. 417, 23 Cal. L. R. 79.

Now, as far as Humphrey and Elkins are concerned they owed to the appellants (plaintiffs) the highest degree of trust. The relationship of attorney and client is of the highest fiduciary character.

Clark v. Millsap, 197 Cal. 765;

Metropolis Trust and Savings Bank v. Mounier, 169 Cal. 592, *596.*

> "An attorney may not assume a position adverse to his client for it is a violation of the duty which an attorney owes his client to assume an attitude antagonistic to him without his knowledge or consent. By virtue of this rule, the attorney is precluded from assuming any relation toward his client which would prevent him from devoting his entire energies to his client's interests."
>
> 3 *Cal. Juris.* 618.

See:

Elberta Oil Co. v. Superior Court, 108 C. A. 344;

Anderson v. Eaton, 211 Cal. 113;

Felton v. Le Breton, 92 Cal. 457.

We not only plead that because of the acts of the Bank and Sinai the appellants (plaintiffs) were defrauded, but also, because of the acts of our own attorneys, we were prevented from presenting to the Court the true facts of the transaction involved in the compromise, prevented from having our day in Court. Counsel for defendant Bank goes on to say that the allegations of subsection (b), paragraph XXXI, imply that the lawyers, Humphrey and Elkins, were acting in good faith. If, in fact, they acted in good faith, is a *question for the trial Court.* As far as the appellants (plaintiffs) were concerned, they were deprived of representation in the Probate Court the moment the interests of the administrators and heirs were conflicting and their lawyers were acting adversely to the interest of the appellants (plaintiffs), an adverse interest the appellants (plaintiffs) did not know until they were put on notice by reason of certain recitals in the answer of John D. Sinai to appellants' (plaintiffs') complaint on file herein. Then only appellants (plaintiffs) discovered the facts of the adverse interest of the defendant Bank, the lack of independent legal representation and the facts forming the *extrinsic* fraud, as set out in the second amended complaint. (See Par. XXXIV, Tr. 42-43.)

Surely, under the circumstances set forth, the Probate Court was not informed of the true existing facts. If appellants (plaintiffs) would have been represented in the Probate Court by attorneys acting on their behalf and through some fraud of an adverse party the Court would have been misinformed, then the fraud would have been intrinsic, *but where the appel-*

lants (plaintiffs) were prevented from presenting their case by their own attorneys' failure to cooperate because of their adverse position as attorneys for the defendant Bank, following the instructions of that Bank rather than their conscience, knowing definitely that those instructions were not to the interest of their clients and the estate of Mrs. Dole, then the fraud became extrinsic. Here we have not only actual fraud by the Bank and Sinai, but also constructive fraud arising out of the fiduciary relationship existing between appellants (plaintiffs) and Humphrey and Elkins, and a fraudulent breach of that duty.

> "Where there exists a relation of trust and confidence, it is the duty of the one in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question and any concealment of material facts is a fraud."
>
> 12 *Cal. Juris.* 772.

No such disclosure was made to the appellants (plaintiffs) by their defendant lawyers, nor by defendant Bank, its special administrator. (Par. XXXIV, Tr. 42-43.)

The knowledge of Dole as to the common agency of the lawyers cannot be imputed to these appellants (plaintiffs). That agency terminated when Dole obtained for appellants (plaintiffs) the service of these lawyers. There is no allegation in the second amended complaint that defendant Dole had a power of attorney from the appellants (plaintiffs) or was their agent for any purpose save to employ attorneys.

Counsel for Bank stresses that there is no allegation in the second amended complaint that the Bank received any benefits of any sort from the alleged fraud, etc. (See page 12 of Brief for Appellee.)

In the first place, whether the defendant Bank received any benefit or not is a matter of proof and evidence.

In the second place, whether the defendant Bank received any benefits or not is immaterial. It is charged that the defendant Bank has participated in the fraudulent acts. The test, in cases of fraud or conspiracy to defraud, is not what benefit the party committing the fraud or guilty of conspiracy to defraud received, *but what injury or damage the victim of the fraud suffered by the tortious and fraudulent acts of the defendant Bank, its officials, attorneys, fiduciaries and employees.*

The second amended complaint contains allegations as to *extrinsic* fraud not found in the original complaint on which a motion to dismiss was granted. Neither the original complaint nor amended complaint contain these allegations.

These allegations are new and are specially directed to facts alleged showing *extrinsic* fraud. We refer to paragraphs XXIII to XXXI of the second amended complaint especially paragraphs XXIII, XXIV, XXV and XXXI. (Tr. 21-41.)

Paragraph XXIII contains the allegations of the death of Mrs. Dole, the communication of said death by Mr. Dole to the present appellants (plaintiffs),

the suggestion by Mr. Dole of employing attorneys to protect the heirs and the communication of the approval of said suggestion by the present appellants (plaintiffs) to Mr. Dole. (Tr. 21-22.)

Paragraph XXIV alleges that said Dole engaged the services of the defendants Humphrey and Elkins as the attorneys of the heirs, that he discussed with said attorneys all the facts and circumstances concerning the transaction between Platt and Sinai and that he entered into a written contract with said Humphrey and Elkins as attorneys for the heirs of Mrs. Dole. That paragraph further alleges the fact that Humphrey and Elkins were not only acting as attorneys for the heirs but also as attorneys for the administrator, to-wit, the defendant Bank. (Tr. 22-25.)

Paragraph XXV alleges the contemplated compromise between the defendant Bank as administrator and defendant Sinai and further shows the strong objections made by Humphrey and Elkins, which in fact were withdrawn because subsequent to it, as shown in paragraph XXVI, Humphrey and Elkins appeared as attorneys for the defendant Bank as administrator in the Probate Court supporting that same compromise to which they so strongly objected to the defendant Bank. (Par. XXV, Tr. 25-26.)

Paragraph XXXI contains the allegations as to the fraud of the various defendants mentioned and *the acting in concert* in the procuring of the compromise alleging specifically that said fraud is *extrinsic.*

Subparagraph (a) shows the relationship of John S. Sinai as a director of the First National Bank of Nevada. It further shows that Sinai and Platt were attorneys for said Bank and in addition it shows that the said Bank was owned, operated and controlled by the Transamerica Corporation, a holding corporation of which the defendant Bank of America is a subsidiary. Subparagraph (b) shows the representations by Humphrey and Elkins to Dole that an opposition to the petition to compromise and an appearance by him before the Probate Court would accomplish nothing and advising him not to appear in Court and that they, Humphrey and Elkins, would represent the heirs at the hearing (Par. XXXI, Tr. 31-41.)

Subparagraph (c) of XXXI shows that Humphrey and Elkins failed to inform the Probate Court of all the facts and circumstances surrounding the transaction and further failed to inform the said Court of the common and fiduciary interests of the Bank of America, First National Bank of Nevada and Sinai and Platt. And further failed to inform said Court of their dual relationship as attorneys for the heirs, including appellants (plaintiffs) and the administrator, the defendant Bank. The allegations of subparagraph (d) show that said attorneys failed to inform the Court of the true value of the alleged indebtedness or of the property then held by said defendant John S. Sinai and belonging to Martina Maxine Dole, deceased, and the said heirs. (Tr. 37-39.)

Subparagraph (e) of XXXI alleges that said defendant Bank, as special administrator, and defend-

ants Humphrey and Elkins failed to inventory the real property of the said deceased. (Tr. 41.)

Subparagraphs (b), (c), (d) and (e) of XXXI allege, in substance, that the appellants (plaintiffs) were betrayed and sold out by their attorneys, defendants Humphrey and Elkins, who were also the attorneys for the defendant Bank as special administrator when, in spite of the fact that they had advised defendant Dole that the compromise of some $5000 was grossly inadequate and unconscionable and had even, as attorneys for defendant Bank as special administrator, protested to the Bank itself and were curtly informed by the Bank that if they did not obtain from the Probate Court the approval of the compromise in the meagre sum of $5000 the Bank would obtain other attorneys, and thereupon said defendants Humphrey and Elkins, without obtaining the consent of the appellants or without advising them of the situation or any warning to them of the antagonistic attitude of the defendant Bank, supinely submitted to the dictates of the defendant Bank and became their willing tools and forsook and betrayed the interests of the appellants, who lived in New York and were kept in total ignorance of these machinations, and suppressing this unconscionable fraud from the Probate Court obtained the inequitable compromise which the defendant Bank has the effrontery to claim is *intrinsic* fraud and *res adjudicata.*

The second amended complaint, in the paragraphs above mentioned, clearly shows that the fraud here is *extrinsic* and *collateral* and was not in issue before

the Probate Court. The dual relationship of Humphrey and Elkins acting as attorneys for the heirs and for the Bank, knowing that the interests of the Bank and the heirs were conflicting, was naturally *extrinsic* fraud. The failure of the administrator and the attorneys for the heirs to inform the Probate Court and the appellants (plaintiffs) of all the circumstances surrounding the transaction to be presented to the Probate Court was *extrinsic* fraud preventing these appellants (plaintiffs) from raising any objections to those proceedings, depriving them of their just day in Court.

The leading case of *United States v. Throckmorton*, 98 U. S. 61, clearly states the law on *extrinsic* fraud.

Sohler v. Sohler, 135 Cal. 323;
Simonton v. L. A. Trust & Savings Bank, 192 Cal. 651;
Campbell v. Campbell, 152 Cal. 201;
Curtis v. Schell, 129 Cal. 208;
Bergin v. Haight, 99 Cal. 52;
Johnson v. Waters, 111 U. S. 640;
Strates v. Dimotsis, 110 F. (2d) 374-376.

In the case of *Strates et al. v. Dimotsis, supra*, prospective bidders were kept from going to Court by the special administrators, deprived of their day in Court (acts of *extrinsic* fraud). In the case at bar, not alone defendant Dole but the heirs were, by the acts of their own attorneys and the defendant Bank, deprived of their day in Court and the same attorneys and the defendant Bank suppressed from the Court the fact that the amount of the compromise was totally inadequate and was a fraud on the estate and heirs.

two of whom, appellants (plaintiffs) were absent from the state and knew nothing of the frauds. (Par. XXXIV, Tr. 42-43.)

Counsel for defendant Bank, on pages 40-41-42 of their Brief for Appellee, indulge in a fanciful but specious explanation of the conduct of defendants Humphrey and Elkins, the attorneys for defendant Bank as special administrator, as well as the attorneys for defendant Dole and the appellants (plaintiffs). They say, facetiously, we assume:

> "There is no suggestion of fraud in this. On the contrary, it suggests that Humphrey and Elkins on one hand and Dole on the other were seeking to play a smart game in the transaction: that they were seeking to obtain from Sinai his $5000.00, believing that the heirs were not bound by the settlement and that they would be able to proceed against Platt. They were hoist on their own petard. At least so far as the Bank is concerned, their smart trick has not worked. But the essential point is that the complaint does not suggest that Humphrey and Elkins in giving this written opinion to Dole were acting in collusion with the Bank for the purpose of preventing Dole from presenting his case upon the hearings." (See page 41 of Brief for Appellee.)

They forget that, under the allegations of the second amended complaint, the defendants Humphrey and Elkins, attorneys for the defendant Bank as special administrator, were compelled to, and did, submit to the dictation and domination of the defendant Bank, although they had previously advised the defendant Bank and the defendant Dole that the compromise

in the sum of $5000 was totally inadequate and unconscionable and illegal, in which advice they were ruthlessly overruled by the defendant Bank; and, under threat of summary dismissal as attorneys, servilely and supinely submitted to the dictates of the defendant Bank and sacrificing the interests of the estate and the heirs including appellants (plaintiffs) for that of the defendant Bank, went before the Probate Court and obtained the orders and judgment of that Court approving the unjust compromise, suppressing from the Court the real and true facts involved in the inequitable and unconscionable compromise and keeping defendant Dole away from Court so he could not protest his objections as an heir of the estate.

If the allegations of the second amended complaint do not set forth *extrinsic acts of fraud* sufficient to attack collaterally the judgment of the Probate Court in San Mateo County, California, then by no stretch of the imagination can any complaint be framed which could set forth any *extrinsic fraud.*

Reducing to a narrow compass the allegations of the second amended complaint against the defendant Bank and the other defendants, they disclose:

(1) That defendant Sinai, the attorney for Martina Maxine Dole during her lifetime, betrayed his sacred trust as her attorney and confidential adviser and sold her out, by acquiring for himself and his law-partner Sam Platt, both defendants, the valuable mining property (alleged to be worth $3,000,000), which rightfully belonged to Martina Maxine Dole

during her lifetime and to her heirs (appellants-plaintiffs) after her death;

(2) During all this time, defendants Sinai and Platt were the attorneys for defendant Bank as well as directors of one of its branch banks in Nevada controlled by its parent corporation, Transamerica Corporation, of which defendant Bank was and is one of its subsidiaries in Nevada as well as in California, and perforce occupying positions of the closest fiduciary relations with the defendant Bank;

(3) When the defendant Sinai was trying to settle (in itself an admission of guilt) for the paltry sum of $5000 his fraudulent conduct to his erstwhile client, Martina Maxine Dole, the defendant Bank, acting as special administrator of the estate of Martina Maxine Dole and of her heirs including appellants (plaintiffs), comes forward and, as such special administrator, dictates and dominates the legal situation by forcing through the inequitable and unconscionable compromise sought to be made by defendant Sinai for his fraudulent conduct, by arbitrarily overruling its own attorneys, who were also the attorneys for the appellants (plaintiffs), and by refusing to permit its own attorneys to voice or make any protest or objection to the compromise in the sum of $5000 as being grossly inadequate and inequitable to the estate and to the heirs, under threat to said attorneys of summary dismissal and, after its own attorneys, rather than losing their job as such, supinely submit to the dictates and domination of the defendant Bank and, having previously advised defendant Dole not

to go to Court or protest the compromise, actually go before the Probate Court and represent to that Court in behalf of defendant Bank as special administrator that the compromise with defendant Sinai was "for the best interests of the estate and the heirs", and, in so doing, actually suppressed the real and true facts involved in said crooked and venal compromise, when they knew in their own hearts that such compromise was not for the best interests of the estate and the heirs, the defendant Bank, as such special administrator, owing the highest fiduciary duty to the estate and to the heirs, became the controlling factor—the real culprit—in forcing through and effecting the grossly inadequate and unconscionable compromise in the sum of $5000 and is just as culpable in this fraud on the estate and the heirs as are its own attorneys, Humphrey and Elkins, and the defendant Sinai and the other defendants who figure in this fraud as alleged in the second amended complaint.

All of these acts or facts of fraud were not before the Probate Court when it heard and made its orders approving the inadequate and unconscionable compromise; it was not an issue before the Court; the defendant Dole was purposely advised not to appear before the Probate Court by the attorneys for the defendant Bank as special administrator who were also the attorneys for the appellants (plaintiffs); the real, true facts involved in this compromise were all purposely suppressed from the Probate Court; they all constituted acts of *extrinsic fraud* sufficient to attack collaterally the orders and judgment of the Probate Court approving this unholy compromise.

If ever a case of fraud was adequately alleged it is the unconscionable fraud set forth in the second amended complaint and the motion to dismiss should be denied and the defendant Bank compelled to answer and the case be tried on its merits.

It is to be noted that the defendant John Sinai, the attorney for the deceased, and who is alleged to be one of the chief and active participators in the fraud practiced on the deceased and on the heirs, after filing dilatory motions, which were overruled, has answered and the case is at issue as to him. He was charged jointly with the defendant Bank and its officers, attorneys and employees in the fraud practiced on the deceased and on the heirs. The defendant Bank is responsible for the acts of its officers, attorneys, fiduciaries and employees in committing frauds within the scope of their employment.

The second amended complaint plainly and clearly charges that the various defendants and defendant Bank were *"acting in concert and motivated by the common design of procuring the aforesaid compromise, said fraud being extrinsic in its nature and character"*. (Par. XXXI; Tr. 32.)

This language charges, in effect, a joint fraud or conspiracy to defraud appellants (plaintiffs).

Under all of the allegations of the second amended complaint, the motion to dismiss should have been denied by the Court below and defendant Bank compelled to *"go to issue and proofs"*.

Bayley & Sons v. Blumberg, 254 Fed. 690-693.

II.

DEFENSE OF STATUTE OF LIMITATIONS.

This is made the basis of the last three grounds of the motion to dismiss by the defendant Bank. These grounds are as follows:

> "Third, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by laches.
>
> Fourth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.
>
> Fifth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by Section 343 of the Code of Civil Procedure of the State of California." (Tr. 46-47.)

These three grounds may be reduced to one contention and that is that the statute of limitations is barred because the second amended complaint is not sufficient to show that the fraud by defendant Bank and the other defendants was discovered within three years next preceding the commencement of the action.

Subd. 4 of Section 338 of the California Code of Civil Procedure provides a period of three years in:

> "An action for relief on the ground of *fraud* or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Section 343 of the California Code of Civil Procedure provides:

> "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

The allegations of the second amended complaint affirmatively set forth that the appellants (plaintiffs) commenced their action for fraud against the defendant Bank and the other defendants within three years of the plaintiffs' discovery of the facts constituting the fraud practiced on them. Their suit was filed on the 12th day of September, 1939, in the Superior ourt of the State of California in and for the City and County of San Francisco. It was removed to the United States District Court in and for the Northern District of California, Southern Division, under the sanction and authority of the Federal Removal Act.

The allegations of the second amended complaint fully meet and negative any laches on the part of the appellants (plaintiffs) and set up and show that they acted promptly and diligently and within three years after their discovery of the fraud practiced on them by the defendant Bank and the other defendants. It must be remembered that the second amended complaint sets up that the appellants (plaintiffs) were and are residents of New York and lived there during all of the times during which the machinations and fraudulent conduct of the defendant Bank and the other defendants were going on in California and in Nevada. (Tr. 20-21; 42-43.)

The appellants first learned of the fraud practiced on them as heirs of the estate of Martina Maxine

Dole in April and July of *1938* and they commenced their action in *September, 1939,* a little over a year after their discovery of the fraud. They certainly acted both promptly and diligently, and within the statutory period of three years after their discovery of the fraud as provided by Sub. 4 of Section 338 and Section 343 of the California Code of Civil Procedure.

Counsel for defendant Bank admits that the second amended complaint states *when* the discovery of the fraud was made but denies that the complaint states sufficient allegations *what* the discovery was, *how* it was made and *why* it was not made sooner. *What* the discovery was, is clearly set forth in paragraphs XXIV to and including XXIX (Tr. 22-30); *how* it was made is set forth in paragraph XXXIV (Tr. 42-43) in which it is positively stated that none of the facts were known to said appellants (plaintiffs) at the time of filing the above entitled action, that appellants (plaintiffs) were placed upon investigation of said facts and circumstances by reason of certain recitals contained in the answer of said defendant John S. Sinai; as to the third point *why* the discovery was not made sooner, the allegations of the complaint show that Dole informed them, that their sister had died, and that he would have defendants C. F. Humphrey and Luther Elkins act as attorneys for all of the heirs-at-law. Appellants (plaintiffs) consented to it. The complaint continues that Dole hired defendants Humphrey and Elkins as the attorneys of the heirs-at-law. There were no circumstances to put appellants (plaintiffs) upon inquiry. They had a perfect right to rely upon the fact that they had attorneys representing them who would inform them of

any events which might alter appellant's (plaintiff's) position.

In *Tarke v. Burgham,* 123 Cal. 163, at *166,* it is said:

> "Where no duty is imposed by law upon a person to make inquiry and where under the circumstances a 'prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty and the failure to make it a negligent omission."

See, also,

Denson v. Pressey, 13 Cal. App. (2d) 472.

As to Dole's knowledge of the fraud, may we refer the Court to our earlier discussion. Nowhere in the second amended complaint is there any allegation from which anybody can draw the conclusion that Dole was the agent of the appellants (plaintiffs) for any other purposes than to employ counsel for them. Counsel for appellee Bank is very well aware of the rule of law that agent's knowledge can only be imputed to his principal if acquired within the course and scope of his agency. Clearly Dole was not a general agent of appellants (plaintiffs) but only a special agent, if at all, for the purpose of procuring for appellants' (plaintiffs') attorneys to represent them. Clearly the mere fact that they are jointly interested as heirs in the same estate does not create an agency relationship.

Therefore, the second amended complaint is sufficient to show that the action is not barred by the

statute of limitations, inasmuch as the action was commenced within three years after the discovery by the appellants (plaintiffs) of the fraud practiced on them by the defendant Bank, and there were no facts known to appellants (plaintiffs) to put them on inquiry previous to their discovery of the fraud as alleged in the second amended complaint.

CONCLUSION.

In concluding this reply brief on behalf of appellants (plaintiffs), we desire to say that if the allegations of the second amended complaint do not set forth *extrinsic acts of fraud* sufficient to attack collaterally the judgment of the Probate Court in San Mateo County, California, then by no stretch of the imagination can any complaint be framed which would set forth any *extrinsic fraud.*

Furthermore, it is the practice of State and Federal Courts, in actions in equity involving important matters to go "to issue and proofs" where a doubtful question is raised by the pleadings. This rule should, in the interests of justice, be applied to the case at bar.

As was well said by the Circuit Court of Appeals in *Bayley & Sons v. Blumberg,* 254 Fed. Rep. 690-693:

> "In Ralston Steel Car Co. v. National Dump Car. Co. (D. C.), 222 Fed. 590, it is said:
>
> 'Under our practice, the federal courts are inclined *to allow a case in equity involving important matters to go to issue and proofs,* where

> a doubtful question is raised by the pleadings. It has been the practice to overrule a demurrer, unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing.'
>
> The practice which prevails in the courts of equity, in disposing of motions to dismiss bills because the bill does not set forth facts sufficient to constitute a cause of action, is to overrule the motion and let the case go to hearing, unless it is made absolutely clear that, taking all the allegations to be true, the bill must be dismissed at the hearing. The appellant contends that, upon the trial, it intends to go back of two of the patents, and produce such additional evidence as would result in sustaining the patent in this action.
>
> "In view of this practice, and, further, that the bill on its face set forth facts sufficient to constitute a cause of action, we are of the opinion that the District Judge erroneously granted the motion, and the order is therefore reversed."

Without prolonging this reply brief, it is earnestly urged and contended that the ruling of the lower Court, sustaining the motion of defendant Bank to dismiss, should be reversed and the defendant Bank compelled to answer and to meet the issues set forth in appellants' (plaintiffs') second amended complaint.

Dated, San Francisco,
December ~~August~~ 5, 1942.

Respectfully submitted,

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